B. The Commission Has No Evidentiary Support For The Proposition That Different Owners Will Increase Programming Diversity.

The Commission claims that the amended television duopoly rule will promote viewpoint diversity. Other than the Commission's bare assertion, there is virtually no support for this proposition in the record or, for that matter, anywhere. The Report & Order states in relevant part:

> Some question whether diverse outlets and sources lead to diverse viewpoints, or whether our rules are necessary to promote diversity, suggesting that commonly owned outlets can produce diverse viewpoints equally well as separately owned outlets. We disagree with these arguments. As the Commission stated when it adopted the newspaper/broadcast cross-ownership rule, . . . it is unrealistic to expect true diversity from a commonly-owned newspaper combination. The diversity of their viewpoints cannot be expected to be the same as if they were antagonistically run. . . . Although the issue is not easily susceptible to empirical proof, we think intuitive logic and common sense support out belief that the identity and viewpoint of a station's owner can in fact influence the station's programming.

R&O ¶ 22 (internal citations and footnotes omitted). The Report & Order goes on to reference two studies supposedly supporting the proposition that ownership diversity will lead to diverse viewpoints being presented on the airwaves. See R&O ¶ 22 n. 46, citing Jeff Dubin & Matthew Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. Cal. L. Rev. 841 (May 1995); Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus* (June 1988). The R&O then notes that, in the context of the newspaper/television cross-ownership rule, the Supreme Court found that the Commission had "acted rationally" in adopting the ownership ban. R&O ¶ 23, citing FCC v. NCCB, 436 U.S. at 801.

This meager showing is completely inadequate to demonstrate that the television duopoly rule is narrowly tailored to further an important governmental interest. First, and most significantly, the Commission has no empirical factual support for its assertion that more and different owners will lead to greater diversity of viewpoint (particularly editorial viewpoint) on the airwaves. The two studies referenced in the report and order do not in any way consider whether, as a general matter, different owners will lead to greater diversity of viewpoints being presented on the airwaves. Both studies (which rely on the same underlying data) consider the effect of the ethnicity and sex of owners on programming content. Dubin, 68 S. Cal. L. Rev. at 841. Nothing in either study supports the much broader argument that merely having different owners will lead to the presentation of diverse editorial viewpoints.

This complete lack of factual support is alone fatal to the rule. To satisfy intermediate scrutiny, a rule must "further[] an important or substantial governmental interest" that is "unrelated to the suppression of free expression" and the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." U.S. v. O'Brien, 391 U.S. 367, 377 (1968). See also Turner I, 114 S. Ct. at 2469; Ward v. Rock Against Racism, 491 U.S. 781 (1989). Mere statements or assertions unsupported by a substantial factual record are insufficient to sustain a rule which burdens First Amendment rights. As the Supreme Court explained in Turner I:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in direct and material way.

Turner I, 114 S. Ct. at 2470.

The inadequacy of the R&O's factual record is reinforced by the decision of the D.C. Circuit in Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992). In Lamprecht, the D.C. Circuit applied intermediate scrutiny to strike down a Commission policy of giving preferences to women in its comparative licensing program. The Commission had justified that preference on the ground that women would tend to air more women's programming, and would thus contribute to diversity of viewpoints. Id. at 391. The D.C. Circuit, in finding the preference unconstitutional, noted that the Supreme Court requires that generalizations about programming content "be supported [and] that the support be strong enough to advance substantially the legitimating government interest." Id. at 175 (internal citations omitted). Any "predictive judgments concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence." Id. at 393 (internal quotation marks omitted). The court found the rule unsupported because, *inter alia*, the Commission could cite "nothing that might support its predictive judgment that women owners will broadcast women's or minority or any other under represented type of programming at any different rate than will men." Id. at 395. The court reached this conclusion notwithstanding evidence that arguably demonstrated that minority owners tend to broadcast more minority oriented programming. Id. at 397-98.[9] As demonstrated in the next section, the FCC had no basis to conclude that insisting on 8 separate television owners in smaller markets would produce more diverse programming.

C. The New Duopoly Rule Will Inhibit Rather than Enhance Programming Diversity in Smaller Markets.

In adopting an 8 separate television voices rule regardless of market size, the Commission clearly ignored marketplace realities -- realities that will effectively prevent the entry of over-the-

---

[9] The Commission's reference to FCC v. NCCB, 456 U.S. at 802, is unavailing. If anything, that decision reinforces the conclusion that the record in support of the rule is inadequate. In NCCB, the Court applied the extremely low level of scrutiny approved in Red Lion and upheld the Commission's newspaper/broadcast cross-ownership rules. In so doing, the Court merely found that the ownership restrictions were not "unreasonable" and called the Commission's judgment "rational." Id. This decision in no way shows that the television duopoly rule could survive the much more searching inquiry required by intermediate scrutiny.

television stations in smaller markets. Because the Commission failed to address these economic realities in small markets or explain how its continued, rigid insistence on maintaining ownership diversity will further its overall diversity objectives, the new duopoly rule will not survive intermediate scrutiny.

1. Marketplace Realities: Pegasus submitted extensive evidence in response to the Second FNPRM demonstrating that today's marketplace realities inhibit new, over-the-air station entry in smaller markets. A combination of economic factors, including the costs of new station construction, the presence of several entrenched, often VHF, over-the-air competitors, relatively low overall market revenues, and competition from cable and other multichannel video providers ("MVPDs"), effectively stifle market entry by new, stand alone over-the-air stations. As a result, Pegasus argued that there could be little wonder that smaller markets today are characterized by high concentration and very little over-the-air programming diversity.

In its earlier comments, Pegasus illustrated that prospective new entrants to smaller markets faced a series of significant economic barriers to entry. First, Pegasus focused on the costs of new station construction. Pegasus estimated that the costs of construction for a truly competitive, stand-alone, full-service commercial broadcast station typically required an expenditure of approximately $2-$5 million, with an additional $1 to $2 million added if a local news operation was planned. While Pegasus recognized that these costs could vary somewhat, depending for example on whether a new tower needed to be constructed, it demonstrated that these start-up costs were relatively inelastic despite a reduction in market size. Pegasus also highlighted how the Commission's truncated DTV build-out schedule added several million more in DTV facility construction costs to a new station's projected start-up costs.

Despite these relatively inelastic start-up costs, Pegasus illustrated that the overall level of market revenue declined much more quickly as market size declined. While the total 1995 television market revenues ranged from $1.3 million to $348 billion in markets 1 through 10, these figures ranged from $86 million to $45 million in markets 50 through 60 and $36 million to $26 million in markets 90 to 100. Pegasus went on to demonstrate that these two factors combined to create a significant entry barrier in smaller markets -- while the overall market revenue level decreased as the size of the market dropped, the minimum annual revenue needed to cover operating and borrowing costs and provide a sufficient return for investors in the start-up station did not decline nearly as fast.

Pegasus estimated that a new, stand-alone station required annual revenues of approximately $3-4 million to cover its fixed costs and generate operating income sufficient to amortize the cost of construction. Pegasus demonstrated that while this annual revenue requirement for a start-up station posed very little problem in large markets like New York City, where a television station could be profitably operated with less than 1% of the estimated 1995 total television market revenue, it represented approximately 10% to 12.5% of the total television market revenue in Jackson, Mississippi (DMA No. 91) and could require as much as 20% to 25% in smaller markets. Thus as market size dropped, the percentage of market revenue that a new, start-up station needed to be successful grew significantly.

The new entry problems did not end there, however. Pegasus also demonstrated that achieving these revenue levels was also extremely difficult given the very high levels of concentration in smaller markets. While the number of stations in markets 1-10 averaged slightly more than 13 and the combined share of the top-3 stations in those markets equaled 63%, the number of stations declined to an average of 5.8 in markets 51-100 and the combined share of the top-3 stations in the market rose to 86.2%. Pegasus demonstrated that the concentration in these smaller markets was due to the presence of a number of entrenched, typically VHF stations that had historically affiliated with either ABC, CBS or NBC and had captured very large shares of the television revenue in the market.[10]

The growth and success of cable television and its multiple channel offerings have exacerbated the barriers to entry faced by new, over-the-air entrants. Whereas through the 1970s, viewers had very few alternatives to over-the-air stations, these choices have exploded in the past two decades. As a result, contrary to the Commission's apparent assumption, the control of a new, over-the-air television license does not simply allow its holder to attract viewers and make money. Instead, it is not at all uncommon for start-up licensees, regardless of market size, to earn a smaller audience share than many cable networks and/or to experience severe financial problems or end up in bankruptcy proceedings. In addition, a number of allocations, especially in smaller markets, remain unbuilt or vacant.

The competition from MVPDs is even more pronounced in smaller markets. Cable penetration in smaller markets is typically higher than in larger markets as viewers respond to the increased variety that these MVPDs offer. Moreover, the programming offerings of MVPDs, most particularly cable systems, have increasingly siphoned audience share (and advertising revenue) away from over-the air stations. In Pegasus's markets, cable programming regularly accounts for between 35% to 45% of the total household viewing in the market. This decline in

[10] Pegasus highlighted how the strength of these well-established stations could be traced at least in part to the FCC's television allocation policies that focused originally on VHF allotments in the early 1950s and then later filled in with UHF allocations. As a result, these well established VHF stations typically accounted for an overwhelming percentage of market revenues.

ratings exacerbates the already significant problems faced by a new over-the-air entrant in smaller markets.

The dual revenue stream of the cable industry has also impacted the ability of over-the-air stations to compete as network affiliates. In the past few years, competition from basic cable programmers has driven the costs of over-the-air network programming significantly higher. These increased programming costs have created a crisis in the relationships between networks and their affiliates. Several major networks, including ABC and Fox, have sought to or successfully taken back advertising avails (or the proceeds earned from their sale) previously controlled by the affiliates to help offset these costs. The networks that have previously made compensation payments to affiliates are trying to reduce or eliminate them and each network has attempted to limit the programming exclusivity they provide to their affiliates, thereby opening a second revenue stream typically through cable exhibition. These developments have only further served to reduce the ability of local stations to compete by increasing the costs they must pay for programming. These increasing costs of programming only make new, stand alone entry even harder to justify.

This combination of factors in smaller markets -- (i) limited overall market revenues, (ii) high required revenue share to cover relatively inelastic start-up costs and operating expenses, (iii) significant competition from well-established over-the-air and MVPD providers and cable programmers -- make it almost impossible to justify a new, standalone over-the-air entry.

2. Economic Solutions: Pegasus illustrated, however, that LMAs and/or duopolies dramatically altered the underlying economics and permitted new entrants to overcome these severe economic barriers. In particular, Pegasus estimated that combining a new station with an already existing station reduced the required start-up costs by as much as 67%, reduced the fixed operating costs of the new station by as much as 67% and permitted the two stations to share and amortize the start-up costs of local news production facilities. These start-up costs savings included the sharing of a single studio, production facilities, master control and other fixed, physical plant costs as well as the possibility of sharing a single antenna on a single tower. These savings, combined with reduced personnel costs, dramatically reduced the revenue level needed to justify new entry in these markets.

Based on this showing, Pegasus urged the Commission to avoid the overly simplistic, but oft-repeated incantation that smaller markets present the greatest risk to the Commission's diversity and economic goals. Pegasus instead argued that the Commission needed to focus on these economic factors as it reviewed the duopoly rule. Pegasus demonstrated that duopolies and/or LMAs were, in fact, economically essential if the Commission were seriously interested in furthering its underlying diversity and economic goals in smaller markets.

Pegasus itself has followed this model to support the start-up of new television stations in several of its markets. For example, Pegasus helped fund the construction and launch of WPME-TV in Lewiston, Maine, the new UPN affiliate in the Portland DMA (Market No. 80). Prior to the involvement of Pegasus, the construction permit for what is now WPME-TV had been unbuilt for a number of years. In this as well as its other markets, the economies of scale offered by an LMA permitted Pegasus to make the substantial economic investment needed to help add a new station to the market. In Portland, the enhanced economic support also enabled Pegasus to upgrade significantly its local news offerings in the DMA. These new stations have materially enhanced the over-the-air programming diversity in their respective markets and increased the choices available for local advertisers. Of equal importance, these increased choices are available to all television viewers in the market, not simply those who can afford to pay for the increased variety available from cable and other MVPDs.

3. The Commission's Error: The Commission's decision to establish an overall duopoly threshold of 8 independent television voices, regardless of market size, ignored this substantial and unrefuted evidence about station entry in smaller markets. Instead, with a striking lack of reasoning or explanation, the Commission mechanically chose to exalt ownership diversity over all else by establishing a threshold that will never be achieved in smaller markets due to the combination of entry barriers identified by Pegasus. In so doing, the Commission forced viewers in smaller markets to continue to turn to cable and other MVPDs for any increases in programming diversity. Ironically, through authority to regulate that is historically derived from the notion of "scarcity" of broadcast channels, the Commission has acted to ensure scarcity in smaller markets by prohibiting precisely the type of ownership combinations needed to help add new stations to the market.

The Commission repeatedly attempted to justify its new duopoly rule based on the "continuing dominant role played by broadcasting in society" and the fact that "broadcast television remains the primary source of news and information for most Americans." Local Television R&O ¶¶ 40-41. Unfortunately, the Commission failed to recognize that new stations in small markets play no role, much less a dominant role, in these markets and do not have the economic resources to provide any local news or public affairs programing. As demonstrated in the record, the costs of a local news broadcast only exacerbate the entry barriers faced by a new station in a smaller market. By failing to face up to these economic realities, the Commission has essentially guaranteed that viewers will not receive any new local news and public affairs programming from start-up over-the-air stations in smaller markets.

One of the most striking portions of the Commission's new duopoly standard is its decision not to count any other providers of video programming toward its minimum voice requirement. This decision reflects the Commission's continued unwillingness to recognize the marketplace competition that these MVPDs provide to over-the-air broadcasters, competition that is especially significant in smaller markets. The Commission's refusal to do so is even more remarkable given the fact that it did include other media in the voice count it established for one-to-a-market waivers.[11] The unwillingness to recognize marketplace realities for over-the-air television stations and the Commission's refusal to recognize that ownership diversity is not an end unto itself combine to produce a completely unworkable duopoly standard in smaller markets.

The Commission's decision also violates the commands of the 1996 Act, which explicitly instructed the Commission to review all of its broadcast ownership rules every two years to "determine whether any of such rules are necessary in the public interest <u>as the result of competition</u>." Section 202(h) (emphasis added).[12] The evidence before the Commission clearly and unequivocally illustrated that competition in smaller markets made the duopoly rule counterproductive because it inhibited both diversity and competition in those markets.

In an apparent attempt to address this issue, the Commission adopted 3 waiver standards for failed, failing and unbuilt stations that it hoped would "provide relief in a more tailored fashion for stations in smaller markets that are unable to compete effectively." R&O ¶ 70. Unfortunately, these waiver criteria do not address the problems identified by Pegasus. First,

---

[11] In particular, the Commission counted independently owned, English-language daily newspapers published in the DMA as well as cable systems (at least as 1 voice), provided cable was "generally available" in the television DMA. Local Television R&O, ¶ 111.

[12] While the Commission did not explicitly include the duopoly review in its first biennial review, it did so only because it was already conducting a review of the rule. Thus, the command of Section 202(h) still controls the Commission's decisionmaking in this proceeding.

they effectively amount only to rebuttable presumptions. The Commission clearly stated that while it will be predisposed to grant waivers meeting these criteria, it intends to entertain petitions to deny seeking to rebut the waiver requests. Id. ¶ 77.

Second, the waiver criteria are vague and do not provide market participants the level of certainty needed to justify the requisite level of investment and commitment to build a new station. In particular, the vague standards create the opportunity for opportunistic, post-hoc collateral attacks on a requested (or previously established) combination. Vagueness and uncertainty are inimical to capital markets. Given this uncertainty, local stations will almost by definition not get the full value of the combinations they create and virtually guarantees that small market entry will be restricted under these waiver standards.

For example, each waiver criterion requires a similar showing -- namely that the in-market buyer "is the only reasonably available entity willing and able to operate the station, and that selling to another buyer would lead to an artificially depressed price for the station." Id. ¶¶ 76, 81 & 86. This standard is vague. For example, what is an "artificially depressed" price? Any amount less than what the in-market station would pay or some specified percentage lower? In addition, what must an in-market station do to qualify as the only "reasonably available" candidate to buy the station? Does that station need to be the only one in the market willing to buy it or the one willing to pay the most for it? As these questions illustrate, and as the Commission has recognized in other circumstances, a waiver policy simply does not provide the level of certainty and guidance that participants in the marketplace need before committing the resources required in these circumstances. This uncertainty is exacerbated for publicly traded companies due to the corresponding disclosure obligations and related duties to their shareholders.

For owners like Pegasus, these vagueness problems are compounded by the fact that the Commission has effectively decided to apply these new standards retroactively by limiting grandfathering protection to LMAs entered into before November 5, 1996. Pegasus entered into LMAs, as it was clearly permitted to do under the Commission's rules, and made substantial investments in several markets that added new, over-the-air stations to those markets. As noted above, Pegasus entered into these relationships in circumstances that satisfied the Commission's proposed duopoly criteria, including the presumed rule for UHF combinations as well as the proposed waivers for new construction and when the combination produced enhanced public interest programming benefits. Unfortunately, Pegasus had no notice at the time it made these investments of the revised waiver standards the Commission would subsequently choose to apply in deciding whether to permit these pro-competitive and diversity-enhancing relationships to continue. In particular, Pegasus had no ability to generate the contemporaneous evidence at the time it entered into these relationships that the Commission only recently decided it would rely on in granting duopoly waivers under its new standards.

Third, and equally important, stations that are combined pursuant to one of these criteria can be transferred together only if the combination satisfies one of the same three vague waiver criteria at the time of transfer. This restriction compounds the problem noted above by failing to provide the requisite incentive for station owners to make the investment necessary to launch a second station in the market. Simply put, the inability to transfer a station will make it even harder to justify an initial investment in smaller markets that have limited overall revenues and significant levels of competition from both over-the-air and cable. In particular, this rule will again subject a station to opportunistic, post-hoc collateral attacks and will clearly punish success -- the possibility of which will only exacerbate the problems in capital markets.

As demonstrated above, by insisting on an overall threshold of 8 television voices before permitting duopolies, Pegasus submits that the Commission has undermined its very diversity goals by virtually assuring that no new, over-the-air television entry will occur in smaller markets. The Commission's decision to ignore these fundamental facts in smaller markets will not survive intermediate scrutiny because the rule is in no way tailored to serve its interest in over-the-air programming diversity in smaller markets.

VI. THE COMMISSION SHOULD ADJUST ITS DUOPOLY RULE TO REFLECT ECONOMIC REALITIES IN SMALLER MARKETS.

To correct these problems, Pegasus submits that the Commission should revise its duopoly rule in several important ways that recognize the economic realities in smaller markets. As discussed below, Pegasus submits that without such action, the Commission will abandon any realistic hope of improving over-the-air programming diversity available to viewers in these markets.

A. The Commission should permit duopolies in smaller markets whenever a second, separately programmed station is added to the market or rescued from bankruptcy.

Given the levels of competition and the significant barriers to new station entry discussed above, the Commission should adopt a presumptive duopoly rule in smaller markets that permits duopolies whenever a second, separately programmed station is added to the market or rescued from bankruptcy. Pegasus submits that such a rule is entirely justified by the economic factors discussed above, factors that have and will continue to stifle new over-the-air station entry in these markets. This rule would dramatically lower those entry barriers faced by new entrants in smaller markets and correspondingly reduce the revenue levels needed to support a new station by allowing them to share both costs and revenues with an existing station.

Moreover, the recommended rule will not result in an overall decline in ownership diversity, as a new station is by definition being added, but will increase programming diversity as well as providing a new outlet for producers of video programming. In fact, as the Commission itself recognized, the owner of two stations in a single market has every incentive to program its stations to attract entirely different audiences: "[u]nder this view, where there are competing parties [two separate owners], each their strategies would be to go after the median viewer with the 'greatest common denominator' programming, leaving minority interests unmet. But where one party owned all the stations in the market, its strategy would be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests." Television Further Notice ¶ 63. The rule would also be consistent with the Commission's observations noted above that ownership diversity is not an end in itself but is instead a regulatory tool designed to enhance over-the-air programming diversity available in these markets.

The addition of a new source for over-the-air television programming in smaller markets should not be underestimated. Such a rule would encourage the creation of new outlets for the so-called start-up networks in smaller markets, markets that these networks have consistently been foreclosed from despite overall Commission policies that encourage the development of these networks. In addition, the proposed rule will provide the only realistic hope that new stations will ever be able to provide local news and public affairs programming. As noted by Pegasus, local news programming adds significantly to the costs of new station start-up, costs that can be more easily absorbed and amortized over two stations. Without such a rule, Pegasus submits that these new networks will increasingly be forced to expand their national distribution via cable and other MVPDs, thereby depriving over-the-air viewers in these smaller markets of the programming diversity enjoyed by viewers in the largest markets.

B. The Commission should allow small market duopolies to be transferred without additional waiver showings.

Pegasus also urges the Commission to allow duopolies in small markets to be transferrable without requiring the prospective new owner to satisfy any of the three waiver criteria. Pegasus urges the Commission to make this change regardless of whether it adopts the presumptive duopoly rule for smaller markets discussed above.

The importance of eliminating the limitation on transfers cannot be understated. The Commission itself recognized the many positive, public interest benefits that have been created by LMAs. These benefits include adding an entirely new station or significantly enhancing the programming carried on the second station. In certain circumstances, these benefits also include the investment in local news programming production facilities as the opportunity to amortize these start-up costs, estimated to be between $1 to $2 million, over two stations makes such an investment possible. In these instances, the combined operations require a serious and substantial commitment of time and resources -- a commitment that the Commission should do everything to encourage as it produces demonstrable and verifiable public interest benefits, especially in smaller markets where standalone new entry is almost impossible.

The Commission's proposal to subject previously approved duopolies to the same three waiver standards discourages these significant commitments. Pegasus has already identified the vagueness problems associated with the three proposed waiver criteria. See infra at 34-36. These amorphous waiver standards provide the perfect opportunity for competitively motivated challenges to proposed transfers. Moreover, as the success of the two stations increases, the likelihood that such a filing will occur will only increase. This uncertainty will cause capital markets to discount these arrangements accordingly, thereby reducing the availability of capital and the incentive of stations to invest in the markets.

Pegasus submits that any concerns about permitting powerful station combinations to be transferred will be properly addressed by the review under taken by the relevant antitrust agency. However, should the Commission decide not to rely on antitrust enforcement, Pegasus renews its earlier proposal that the Commission apply a combined market share test that limits presumptive transfers of duopolies if the combined market share of the two stations exceeds 40% or the market share of the number one station in the market, whichever is smaller. This market share test addresses any legitimate economic concerns without unduly punishing the investing station.

While the Commission's theoretical interest in preserving the opportunity to create two separately owned stations is understandable, Pegasus submits that the marketplace has already addressed this issue. Absent the support of an existing station, new station entry is virtually non-existent in smaller markets and the increasing level of over-the-air audience fragmentation to other MVPDs (to say nothing of the Internet and the increasing number of other viewer distractions) strongly suggests that those prospects will never improve. The ever-increasing tension between the networks and their affiliates is yet another example of the profound, irreversible competitive changes that have occurred in recent years, changes that have the most significant impact in smaller markets.

By their very nature, small markets do not present a very attractive target for investors or lenders. The limited size of overall market revenues and the competitive landscape described above are significant deterrents to serious financial commitments. Pegasus submits that the Commission should do its best to remove any regulatory obstacles to serious financial commitments in smaller markets. By permitting duopolies to be transferred, the Commission will ensure that its new rules do not punish success or discourage entrepreneurial, public interest commitments. The proposed market share test should assure the Commission that transfers will not be allowed in those instances where the two combined stations represent a significant economic factor in their market. Given the state of competition and diversity in smaller markets, Pegasus submits that this proposal is well worth the limited regulatory risk involved.

C. The Commission should expand or clarify those station relationships entitled to 5 year grandfathering.

To the extent the Commission does not change its LMA grandfathering decision, Pegasus submits that the Commission should expand or clarify the relationships between stations that are entitled to 5 year grandfathering. Specifically, Pegasus submits that stations with programming relationships more extensive than LMAs (e.g., satellite stations) that were in effect before November 5, 1996 should also be entitled to 5 year grandfathering if the satellite status between the stations was subsequently ended.

Pegasus owns and operates WOLF(TV), NTSC 56 (Fox), Hazleton, PA and programs WSWB(TV), NTSC 38, (WB), Scranton, PA pursuant to an LMA originally dated June 26, 1997. Pegasus formerly owned both stations (although they had different call signs) and operated what is now WOLF as a satellite of what is now WSWB. These two stations, along with a third station that was and remains a satellite station, operated on a satellite status since the late 1980s.[13]

After more than a year of filings and negotiations with the Commission staff, Pegasus ultimately received permission in 1997 to relocate the transmitter of what is now WOLF to the site used by other stations in the Wilkes Barre/Scranton market. Pegasus completed construction

[13] Pegasus also owns and operates WILF(TV), Williamsport, PA as a satellite of what is now WOLF and will continue to do so.

of the new WOLF facility in 1998. This station upgrade permitted Pegasus to serve the market without the need for the market coverage provided by what is now WSWB. In anticipation of the WOLF upgrade, Pegasus sold what is now WSWB but continued to program it pursuant to the 1997 LMA. WSWB signed on as the new WB affiliate in the DMA in November 1998.

Pegasus submits that in these circumstances its LMA between WOLF and WSWB should be entitled to 5 year grandfathering because the programming relationship between these stations in effect as of November 5, 1996 was more extensive than a typical LMA. By definition, a satellite relationship is a more extensive programming relationship than an LMA because it involves complete duplication rather than simply separate program selection. Because this satellite relationship predated the November 5, 1996 cut-off date, it should be entitled to the same treatment as any LMA in effect as of that date. Pegasus submits that a contrary result would punish Pegasus for actions that were clearly in the public interest.

VII. CONCLUSION.

As demonstrated above, Pegasus submits that the time has come for the Commission to recognize the marketplace realities in smaller markets and abandon its one size fits all approach to regulating television ownership in those markets. In smaller markets, the Commission's new 8 independent television voices duopoly rule will not enhance its diversity policy. Instead, the rule will continue the status quo where new over-the-air station entry is non-existent and viewers are required to turn to cable for new video programming. To counteract these undeniable marketplace facts, Pegasus urges the Commission to encourage significant, long term investment in smaller markets by presumptively allowing any duopoly that adds a new, separately programmed station to the market or rescues one from bankruptcy. To provide the proper regulatory incentive for investment, Pegasus also strongly urges the Commission to permit duopolies in smaller markets to be transferrable without satisfying the new proposed waiver standards. To the extent the Commission is unwilling to rely on the antitrust enforcement agencies, Pegasus submits that the Commission should only limit presumptive duopoly transfers if the market share of the combined stations exceeds the smaller of (i) 40% or (ii) the market share of the number 1 station in the market.

Respectfully submitted,

R. Clark Wadlow, Esq.
Thomas P. Van Wazer, Esq.

SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, DC 20006
(202) 736-8000

Katherine Adams, Esq.

Sidley & Austin
875 Third Avenue
New York, NY 10022
(212) 906-2000

Its Attorneys

Date: October 18, 1999